From: Michael Marking
To: Microsoft ATR
Date: 1/27/02 11:35pm
Subject: Microsoft Settlement

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Sunday, 2002.01.27

Renata B Hesse
Antitrust Division
U S Department of Justice

by e-mail to microsoft.atr@usdoj.gov

Dear Renata B Hesse:

I am opposed to the terms of the proposed settlement ("Stipulation") in United States of America vs Microsoft Corporation. (Civil Action No. 98-1232 (CKK))

There are many faults in the terms of the Stipulation. I will briefly list some of the most egregious:

(1) The penalties proposed to be paid Microsoft Corporation for past actions are wholly inadequate when viewed against the scope and severity of Defendant's past actions. Although it is impractical for the most part to attempt to restore conditions to those existing prior to the unlawful conduct of the Defendant, Microsoft will be allowed to retain almost all its unlawfully-acquired profits, and no attempt is being made to compensate past or existing customers and competitors in any way for their injuries.

One of the most profitable violations of the law in history is not being redressed.

(2) The development of open-source and free software is one of the most innovative, vital, and fastest-growing segments of the information services industry. It is also (by Microsoft's own words) the strongest threat to their monopoly. By the inclusion of terms allowing Microsoft to avoid licensing APIs and other information to non-business entities, the Stipulation actually strengthens Microsoft's monopoly. As such it works to achieve the opposite of what is ostensibly desired.

(3) The details of the terms allow Microsoft to delay releasing important information (such as APIs) until their value has been considerably reduced, while allowing its own middleware and application developers to use them early. This permits Microsoft to continue to to act in the very way which is contrary to the law, to use its monopoly in one market to further its own dominance in another.

Microsoft's own developers in middleware and applications areas have a distinct advantage over those of competitors, allowing Microsoft to continue to use its monopoly in one market to unfairly compete in other markets. This Stipulation does almost nothing practical to remedy that situation. APIs should be published as soon as the middleware and applications developers have access, not after they have made use of them.

(4) Some of the terms are vague. For example, their is no specificity with regard to the level of detail required for documentation of interfaces and other technical information. Although such matters are sometimes difficult to specify, in other agreements it has sometimes worked well to make comparisons. (The Stipulation might specify documentation quality, detail, and thoroughness equivalent to that found in some other specific documents. The comparative documents might even be certain ones from the Microsoft Press.)

Similarly, there are no definitions of releases or other critical business and engineering activities and events. Is an "evaluation copy" or "test copy" given in advance of a beta to be excluded from the requirements of the Stipulation?

(5) The ability of Microsoft to enter without restriction into joint venture or joint development agreements is an easy way for them to circumvent some of the other restrictions.

(6) Microsoft is free to use combinations of the various loopholes (such as the joint venture or development clause in Paragraph G) to put development of critical sections of the code out of the reach of the restrictions given in the stipulation, folding those technologies back into Microsoft when convenient for them. Through back-licensing and option agreements, the requirement to publish APIs in a timely fashion will have been avoided.

(7) The Stipulation focuses on desktop computers. However, Microsoft and most of the rest of the industry feel that future growth will be more in areas of entertainment, networks, and embedded systems. Since there is an apparent surrender on the part of the United States regarding past unlawful actions and profits, a forward-looking agreement should at least consider the way Microsoft's

business will operate in the future.

In summary, the Stipulation seeks to bypass the law, legitimizing conduct which violates the anti-trust laws. It is little more than a sell-out.

Normally, I would think that the short (five-year) term of the Stipulation is too short to be effective. However, under the circumstances, this agreement may make matters worse rather than better, so -- if it is permitted at all -- perhaps it should expire after only a year. At that time, the Court should review how well the terms of the Stipulation have worked to further the interests of the people of the United States.

Sincerely yours,

Michael Marking

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